IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,
Plaintiffs,
vs.
R.J. REYNOLDS TOBACCO
COMPANY, et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
Wednesday, 1:50 p.m.
July 12, 2000
PHASE II-B
TRIAL - VOLUME 578

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

APPEARANCES:
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SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs
WINSTON & STRAWN
DAN WEBB, ESQ.
BRADLEY LERMAN, ESQ.
On behalf of Defendant Philip Morris
DECHERT PRICE & RHOADS
WILLIAM DODDS, ESQ.
On behalf of Defendant Philip Morris
COLL DAVIDSON SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris
ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris
CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
DOUGLAS J. CHUMBLEY, ESQ.
On behalf of Defendant R.J. Reynolds
JONES, DAY, REAVIS & POGUE
JAMES JOHNSON, ESQ.
JAMES YOUNG, ESQ.
DIANE G. PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds
KING & SPALDING
GORDON SMITH, ESQ.
On behalf of Defendant Brown & Williamson
CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

APPEARANCES (Continued)

SHOOK HARDY & BACON
KENNETH J. REILLY, ESQ.

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WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
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GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
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On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group
ADORNO & ZEDER
ANTHONY UPSHAW, ESQ.
On behalf of Defendant Brown & Williamson
DEBEVOISE & PLIMPTON
JOSEPH P. MOODHE, ESQ.
On behalf of Defendant Council for Tobacco Research

(Whereupon, the following proceedings were had:)
THE COURT: All right. Have a seat, folks.
Okay. Mr. Reilly, are you up next?
MR. REILLY: Yes, Your Honor, I am.
THE COURT: Are you ready?
MR. REILLY: I am. Do I look ready?
THE COURT: All right. Let's get the jury out, please.
MR. REILLY: Don't answer that, Judge.
THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.
(The jurors entered the courtroom.)
THE COURT: All right. Be seated, folks. Thank you.
I believe Mr. Reilly is up next for Lorillard?
MR. REILLY: Yes, Your Honor. Thank you.
Good afternoon, everybody.
THE JURY PANEL: Good afternoon.
MR. REILLY: As you know, David Ross and I have represented Lorillard in this punitive damage phase, and I would like to begin and just take one minute, because you've been complimented quite a bit, and you deserve it. But on behalf of Lorillard, David Ross and myself, I would like to thank you for your

patience, perseverance, and your attention; not just for this phase or in the phase involving the three class representatives that I've been involved in, but Phase I as well.
You know that Lorillard only brought one

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witness to this courtroom, and we always intended to bring one witness to this courtroom, and that was Marty Orlowsky, the most important person at Lorillard.

He came as the second-to-the-last witness, and he was brought here to discuss all aspects of Lorillard today with you.

All the evidence is in now, and I'm going to make my closing argument as brief and to the point as I know how.

You already know what punitive damages are for. I'm not going to explain that to you. You already know that punitive damages are assessed against each of the individual defendants, a separate line on the verdict form. I'm not going to go over that with you.

You know that there are a number of things you can consider when you reach the ultimate question that you're being asked now, which is: What, if any, punitive damage award to award against Lorillard in this phase?

One of the things that Judge Kaye is going to tell you that you can consider is the nature, extent and degree of misconduct that you found Lorillard engaged in in rendering your Phase I verdict.

Clearly, one of the elements of that is the extent to which Lorillard's cigarettes caused harm to the members of this class.

You learned in Phase I, and it was repeated, although very limited in this phase, it wasn't repeated very much, that Lorillard is now and has been the second smallest cigarette manufacturer -- you've heard me say this before -- cigarette manufacturer of these defendants. And for as far back as you can see, Lorillard's market share has been in a range from 7 to 9 percent of not only the Florida market, but the American market as a whole.

Occasionally, it's ranged as low as 6 percent or as high as 10 percent. Last year it was 10 percent; now it's back down to 9 percent.

What does that mean? It means that better than 90 percent of all the people in this class won't have become addicted to or ill from smoking Lorillard-manufactured cigarettes.

When I tell you that, as I said in my opening statement, I'm not trying to get you folks to ignore

the full extent, the full scope of your Phase I verdict as to Lorillard.

But, clearly, now the extent to which Lorillard's cigarettes caused harm to the members of this class is an important element for you to consider in this phase of the case.

In Phase I, you folks heard evidence that related to the fraud and conspiracy counts. It's been said many times in this courtroom that we don't know exactly what evidence persuaded you to render the verdict that you did; and that's true, we don't know exactly what evidence was persuasive.

But to be quite honest with you, I think the categories of evidence are readily apparent: Misrepresentation, concealing of information regarding health effects of smoking, the addictive nature of

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cigarettes, and youth smoking.

Maybe I'm wrong, maybe I'll be dead wrong about this. But I think those were the issues that you were addressing when you rendered your Phase I verdict on fraud and conspiracy.

What I do know is that your Phase I verdict, as far as Lorillard is concerned, could not have related to any destroyed documents or foreign research or research conducted overseas, because Lorillard is a

purely domestic manufacturer of cigarettes. It has no foreign operations whatsoever.

Now, after your Phase I verdict and after the verdicts involving each of these class representatives, Marty Orlowsky, Lorillard's new chief executive officer as of January 1999, determined that it was absolutely mandatory that he come here and talk to each of you; look you right in the eye and tell you how Lorillard today, under his chief officership -- I suppose that's the term; maybe it's not -- is conducting business on a daily basis in direct response to not only your verdict in Phase I, your verdict in the class representatives cases, but in addition to that, to the voice of the American public talking about the broad issues involved in tobacco.

And he came here to address with you several topics, a variety of topics, that were related to those issues. If you'll bear with me for just a minute, I have no Elmo support.

I put these down. I'm not going to go through these in enormous detail. But he first came and -- first and foremost, the most important reason he came here was to talk to you about causation and addiction. That was number one. Because maybe he's wrong and maybe we're wrong, but the message we got

from your Phase I verdict was causation and addiction.

He came in here to tell you Lorillard's clear, simple, correct agreement that smoking causes lung cancer and other serious diseases;

He came here to tell you of Lorillard's acknowledgment that smoking is addictive;

He came in here to talk to you as well about Lorillard's limited advertising program that doesn't target youth and doesn't significantly expose youth to cigarette advertising;

He came in here to talk to you about the youth smoking prevention program that he initiated after he became chief executive officer;

He came here to talk to you about Lorillard's commitment to the current -- I'm sorry -- Lorillard's current cooperation with public health organizations; Lorillard's public disclosure of company science and ingredients; and Lorillard's support of effort -- all efforts -- towards reducing the risk of smoking through the development of a safer cigarette.

Now, I'm not going to take a long time talking about each of these topics, but I would like to cover the highlights of Marty's testimony with you on each of them.

I'll take them in order.

Lorillard's position on causation has been in

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evolution since before 1997. In October of 1997, Lorillard, like all these other manufacturers, made a commitment to Congress that it would no longer discuss, no longer publicly discuss smoking and health issues. There was a reason for that.

This industry's critics and I think you folks found that the industry was engaged in a process of confusing the American public. I think that's what your fraud finding is about.

Lorillard wanted to ensure that from going forward, from October of 1997 on, there was no more opportunity for someone to criticize Lorillard as engaging in confusion of the American public. The idea was that the only voice the American public would hear on smoking and health issues was that of the public health community.

Lorillard maintained that silence until Marty came here -- actually, 11 days before Marty came here -- 11 days before this trial started, when Marty gave a deposition in this phase of the case, and then when Marty came here and testified before you.

Lorillard considered a Web site, a smoking and health or health issues Web site. But its thought was that, regardless of what it put on a Web site,

antitobacco folks would criticize anything that went up.

And you saw that very situation play out in this courtroom. The Web sites of Reynolds, Brown & Williamson and Philip Morris have umpteen pages of information in them, yet every Web site was criticized.

Lorillard thought that might breed additional confusion. It didn't want to have that possibility occur, so it didn't do a Web site.

On Monday, Mr. Rosenblatt talked at length about Mr. LeBow and Liggett and Dr. Burns.

Remember, Dr. Burns came here and testified three times for the Plaintiff, first in Phase I, then twice in Phase II in the cases of the class representatives.

And then, because Dr. Burns had said some positive thoughts about what Mr. LeBow had said on the issue of what I'll call general causation, Does smoking cause lung cancer and other serious diseases; specific causation, Does it actually occur in real people, including members of this Engle class; and is smoking addictive. Those were three categories of topics that Dr. Burns, in his video deposition that was shown to you in this courtroom, said Mr. LeBow had addressed. And he complimented Mr. LeBow for his forthright

approach to those issues, his forthright stand on those issues.

And he said that for the public health community to begin meaningful discussion about mitigating problems related to tobacco, Dr. Burns said: You have to begin from the truth.

He described what Mr. LeBow had said as beginning from the truth; that he addressed causation -- Does smoking cause lung cancer and other diseases? -- without using the terms "risk factors," "in populations" -- in other words, without equivocation.

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Did he say that smoking would cause or did cause the illnesses in at least some of the members of this Engle class? And he said that smoking was addictive in plain, straightforward terms, without equivocation.

Let's see what Marty Orlowsky said to you in this courtroom from that witness stand.

This is Page 55876, starting at Line 12. He was asked, question: I want to switch to another subject now. We've heard about your background and the background of the company. I want to move right now into a topic of great concern in this trial.

David Ross was asking him these questions:

I want to ask you a couple of very simple and direct questions about Lorillard's position today on the issues of smoking and health. Okay?

First, in Lorillard's position today, does smoking cause lung cancer and other serious diseases?

His answer was: Yes. It is Lorillard Tobacco Company's position that we agree with that statement. It does cause lung cancer and other diseases.

Clearly and without equivocation, Lorillard says yes. A one-word answer, ladies and gentlemen, and you played a role in it. The one-word answer was: Yes.

At Page 55873, Line 7. Question: And does Lorillard acknowledge that there are members of the Engle class who contracted lung cancer or other serious diseases as a result of smoking?

Three-word answer. You played a role in it: Yes, we do.

Trial transcript 55873, Line 1. Question: Let me shift to another but similar subject, the question of addiction.

Again, I will ask you directly and clearly, in the view of Lorillard Tobacco Company today, since you have been CEO, are cigarettes addictive?

A one-word answer. You played a role in it: Yes.

Ladies and gentlemen, that clearly met the criteria established by Dr. Burns for beginning from the truth, so that this company can go forward with the public health community and the American public and carry on open, frank and meaningful discussions about how we mitigate the problems related to tobacco.

Dr. Richmond addressed Lorillard's position. Now, Dr. Richmond, you know, came and testified in this phase before Marty took the stand. So when I asked Dr. Richmond this question, I had to use the deposition testimony, which literally was identical to what Marty came and told you. But the deposition was taken 11 days before this phase of the trial started.

So I asked Dr. Richmond to assume if he -- meaning Marty -- testified in his deposition 11 days ago that Lorillard's position today is that we accept and agree: Is the public health authority's definition that cigarette smoking causes serious diseases, as lung cancer and other diseases, and that smokers have -- are more likely to develop such diseases than nonsmokers, is that an accurate statement?

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And Dr. Richmond said: Yes, that's an accurate statement.

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And I think if he -- meaning Mr. Orlowsky -- embraces that, I think that's the first I had heard of an executive stating that openly and completely other than from the Liggett firm and Mr. LeBow.

You folks played a role in that.

Now, on cross examination, did Mr. Rosenblatt acknowledge Lorillard's position? No.

The approach on cross examination was to attack Marty for having had a different opinion in 1993 and in another case called Ironworkers.

Marty, on direct examination, had already acknowledged that he held a different position years ago. What he said on direct examination: This is a change in position for Lorillard. Since I became CEO, this is Lorillard's position.

This position by Lorillard is absolutely, ironically, the very position that every one of plaintiffs' experts says is the appropriate position for a cigarette manufacturer to have today.

Is Lorillard looking for a pat on the back for having done the right thing? No. But, in fairness, should there be some acknowledgment that here, in front of you, as a result of your verdicts, that Lorillard did the right thing?

Ladies and gentlemen, I'm going to move to a

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third topic. That's how quickly we're moving. I'm going to do this in an hour.

In my opening statement, I showed you exhibit -- what is now Exhibit 38037. I'm going to talk to you about Lorillard's very limited advertising campaign.

When Marty Orlowsky took the stand, he explained Lorillard's advertising campaign. He told you that in 1998, Lorillard spent $43 million advertising the one brand of cigarettes that Lorillard manufactured -- I'm sorry -- that Lorillard advertises.

Lorillard manufactures half a dozen or more brands of cigarettes, but it only advertises one. And in 1998, it spent $43 million advertising that brand.

You know at the end of '98 with the Master Settlement Agreement, Lorillard agreed to do away with all billboards.

$25 million of that $43 million was for billboard advertising. In 1999, Lorillard's budget for advertising was $18 million.

Now, it could have put the $25 million into additional magazine advertising or sponsorship or something else. But it didn't. Where did the money go? You don't have to be a mathematics expert to figure this one out. At the end of this year,

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Lorillard will have spent $24 million on its youth smoking prevention program.

I showed you this chart in my opening statement, and Mary Orlowsky testified to it when he was on the stand. He explained that in 1999, Lorillard spent $7.7 million on what's called "media expenditures."

What does that mean? Media expenditures is

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the cost of advertising space in magazines.

It spent $7.7 million on the one brand of cigarettes that it advertises: Newports.

In that same year, it spent $8.4 million on media buys. That's television air time and magazine ad space for its youth smoking prevention TV ads and magazine ads.

Now, Mr. Rosenblatt has maintained many, many times in this phase that you have to add millions more dollars onto the advertising cost, onto the blue column, for promotion; things that can influence kids and nonsmokers to begin smoking.

Marty Orlowsky testified as to what promotional budget means at Lorillard. At Lorillard, the items that make up the promotional budget, does that refer almost exclusively to price reductions in your cigarettes? This is Page 56198.

Answer: Yes, it does.

Just so we all understand it, if Lorillard decides for a period of time to reduce the price of cigarettes, say 20 cents a pack, that 20 cents, that's part of your promotional budget?

Answer: That's correct. The vast majority -- not every penny. The vast majority goes to these price reductions, in either the form of coupons or some price-off that we pay for when the customer goes into the retail store. That's the difference between the regular price, and the lower price is what we pay. That's essentially what the promotional expense is.

Ladies and gentlemen, it's important -- why am I telling you this?

You might be sitting there saying: Why is Reilly telling me this?

I'm telling you this so that you'll understand that Lorillard really does have a very limited advertising campaign for the one brand of cigarettes it advertises; and that it really has a serious campaign. As small as Lorillard is, it has a serious campaign for youth smoking prevention.

Now, Mr. Rosenblatt, on cross examination, talked about Lorillard promotion. And what he talked

about, what he cross examined Mr. Orlowsky about, was a promotion program that Lorillard had years ago involving prisons.

I don't know if you remember this or not, but Mr. Rosenblatt said: Hey, how about your promotion program for all those prisons, where you provided them with sneakers and basketballs and pool tables and weight sets?

And Mr. Orlowsky -- Marty was happy to talk about that program. Why? Because the truth of it was that the prisons, who couldn't afford these weight sets, these sneakers, these basketballs, came to Lorillard and said: Look, we're selling cigarettes to our prisoners. We would like to sell them cigarettes that you manufacture and have you give us equipment so that we'll have equipment that we can't buy.

The only thing that you can conclude from that line of inquiry is that it's the plaintiffs' position that we should have turned the prisons down;

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that a reasonable manufacturer would have said: No, we won't provide that promotion.

I would like to switch topics: Youth smoking prevention.

I told you that in opening statement, that when Marty became CEO, he felt all of a sudden a need

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for a youth smoking prevention program. He thought it was the right thing for a responsible cigarette manufacturer to do, and I'm not going to go into our youth smoking prevention program ad nauseam.

What I am going to remind you is what I said to you, that plaintiffs' experts were going to criticize Lorillard's program without ever having taken the time to find out anything about it, not one thing. Not one thing.

They're going to say that it glamorized smoking; that it couldn't be effective because it wasn't designed by anybody that knew anything about how to do it.

But you got to see it. You got to see where Lorillard put its 630 TV ads. This is Exhibit 38044. You probably can't read that, but on the Warner Brothers Network, NBC, MTV, USA, UPN, ESPN. And on these magazines. This is Exhibit 38047. You got to see all that.

And how effective was this program?

This program -- they measured the effect of this program. This isn't something that you just put out there and pay no attention to. They measured how many times kids, between the ages of 6 and 17, actually saw our ads. 40 million kids in the United States

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between the ages of 6 and 17 saw this program on average between seven and eight and a half times.

If you want to target kids, this is how you do it. 40 million kids on average of seven to eight and a half times.

This is one of the magazines that Mr. Rosenblatt put in evidence because it has a Lorillard ad in it. And this is one of the magazines that is clearly an adult magazine. I don't think there's any doubt about that.

Mr. Rosenblatt said: I'm going to put these magazines in evidence. They're going to go to the jury room so you can look at the articles.

Look at the articles. I don't think I'll offend anybody. I'm not a prude myself, but this says: Maxim for men: Sex, sex, sex. Is that all you ever think about?

Instant Ninja, Shotgun Sweethearts. This is not a kid's magazine. And you know what? I could go through this stack right here. And the magazines that we advertise in, I can pull out the titles: Tantric Sex.

Yeah, I'm sure if you were 13 or 14 or 15 years old and you're at a neighbor's house, and the neighbor -- this is Exhibit 132-B. If your neighbor's

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parents have left this magazine on the coffee table, I'm sure if a 13 or 14-year-old or 15 or 16 or 17-year-old could look through it or thumb through it, he might really want to look at the pictures and the

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articles.

Now, I'm going to show you ladies and gentlemen. How long is he going to spend on that ad, really?

How long is he going to spend on the picture right next door to it?

Are we really targeting youth with this magazine and that ad?

You remember what Marty said his son said about this campaign?

He said: Dad, it sucks.

You know what? He was right.

That's not a direct quote.

We do advertise in Teen People, in Game Pro. I think this is WWF. I have to admit, I'm not -- Marty is not a golfer; I'm not a wrestler. We advertise in Teen People. But you know what we advertise? This is where we advertise our youth smoking prevention program.

Do you think these folks who make these magazines know how to reach kids in the age group we're

dealing with?

You folks got to see our ad, our TV ads. You got to see the burning guitar and you got to see what I think is most effective, the piercing parlor, where the young man goes down the hall and you don't know what he's going to go do, but when he gets down at the end of the hall, he walks in and sits down in a chair and then he has his tongue pierced.

Now, the plaintiffs' experts maintain that that ad glamorizes smoking. You remember at the end of the ad, the old man says: Join me in a cigarette? And the young man says: You think I'm crazy?

You tell -- you get to tell us, because as I said to you in my closing argument in Phase II-A, every verdict you enter sends a message to us. You tell us whether that isn't an effective, edgy ad to communicate to teenagers today that smoking is not worth the risk.

You know that we hired Bozell Worldwide, the ad agency that comes out with, among other campaigns -- do you think they do any good work? There's the "Got milk?" campaign. They do that.

Mr. Rosenblatt's expert said our campaign can't be any good because we didn't hire anybody that knows anything about communicating with teenagers on issues like this. Bozell worked with Youth

Intelligence, a communications company that specializes in communicating with teenagers. They're the people that were hired by the federal government to design and implement their drug prevention control program.

And Lorillard asked them to do one thing. It's a total hands-off deal. Lorillard asked them to do one thing: Please design us and implement us a campaign that will affect the attitudes of kids.

You heard of that. I'm not going to show you the Web site. You've heard about our youth smoking prevention Web site called "buttoutnow." You heard about our unique scholarship program. I've got in my hands now two of the winning scholarship program application -- two of the winners, 38058 and 38059. You remember this is called "TeenHIP," Teens Helping

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Influence People.

The idea is you take outstanding kids in their community and you get them to pledge that they'll never smoke. And then, because of their outstanding position in the community, they will influence their peers to not smoke as well.

You're going to have these in the jury room. It's just a suggestion. Take a look at who these kids are, and take a look at their commitment against smoking.

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You know that the other half of Lorillard's youth smoking prevention program relates to parents. And, again, I'm not going to show you a Web site. I'm going to move right through this material.

You know that we advertise in magazines with -- we showed you some of the magazine ads. Perhaps you've seen this on your own. That's one of them. That's from 38069.

We advertise our program in these magazines. That's Exhibit 38066. We measured the effectiveness of this ad campaign as well. It reached -- and you'll have all this in the jury room. It reached 62 percent of adults ages 35 to 49 on average four times in 1999.

Now, who are the adults -- why did we target the people 35 to 49? Because they're the people that have the kids between 6 and 17.

Do you recall that we hired Dr. Michael Popkin, who has a Ph.D. in counseling psychology, and he has a company called Active Parenting of Teens?

We asked him to design a parenting program. What is the parenting program for? It's to convince parents that they not only must, but they can effectively talk to their kids about smoking and convince them not to smoke.

Now, you know that our program is called

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"Take 10." You know that Dr. Popkin prepared this brochure. It's available to parents through Lorillard through calling a 1-800 number or getting on our Web site. And it's a great little brochure for a guy like me because it has lots of pictures in it.

It's a step-by-step. First it says: Talk to your kids; you need to talk to your kids. Then it suggests how to go about doing it.

Clearly, altogether, this is a good program. How was it addressed on cross examination by Mr. Rosenblatt?

Well, first of all, he accused Marty Orlowsky of having been a failure as a father because his 23-year-old son smoked cigarettes. That personal attack, ladies and gentlemen, was wholly uncalled for, and shows what Mr. Rosenblatt was reduced to in order to criticize this program.

The only other serious attack he made was to say that this Take 10 brochure was really a promotional piece for Dr. Popkin.

Well, ladies and gentlemen, you're going to have this in the jury room, and I would ask you to do -- don't take ten. Take one. Take one minute and look at this little brochure and ask yourself. It's about 10 or 11 pages long. One minute. Decide for

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yourself whether the first ten pages or so that are all about what parents can and should do and how to go about doing it, are what this brochure is about; or is it about that paragraph, this paragraph in green on the back that gives a little piece about Dr. Popkin?

You decide whether this is nothing but a promotional piece for Dr. Popkin.

Ladies and gentlemen, Mr. Rosenblatt's experts maintain that if you're going to be a responsible cigarette manufacturer today, you have to advertise responsibly, and Lorillard agrees with that 100 percent.

The question is: What does that mean? You talk about fluff. The question is: What does "advertise responsibly" mean?

That means when, where, how. Is there a template? Is there a pattern? Is there a cookie cutter that someone has come up with that says: Okay, this is the plan; this is how it's okay to do it?

The answer is: Absolutely not.

Who did Mr. Rosenblatt bring here who he touted as the number-one expert that he was going to present to you on this issue of advertising? It was Dr. Michael Siegel.

This is how tough this issue is. This is

Page 52101, Line 3. Cross examination, I believe, by Mr. Johnson.

Question: And I just want to follow up on a couple of things. I represent Reynolds Tobacco Company, as you may recall.

As I understand, you believe that magazines that are predominantly or substantially adult readerships are where tobacco ads should be, as opposed to the opposite?

Answer: Yes.

But you can't tell us how to define those two?

Answer: No, I really haven't developed some sort of criteria.

Well, that's enlightening.

Question: But you believe the companies should know that the answer to that question, what is an adult and what is youth --

Answer: You know --

Question: -- even though you don't know?

Answer: No. It's not that I don't know what is an adult or youth magazine; it's that I haven't decided on a criterion for what I would consider to be reasonable to advertise in.

Well, you know what? I can shake that part

of this transcript til the cows come home, and no answers fell out. Not one.

Is Lorillard committed to trying to solve what is an appropriate ad campaign? Of course it is. Of course it is. The attorneys general, the National Association of Attorneys General are committed to the same thing. They oversee how Lorillard advertises.

You know who they hired? You know who the Attorney General of California hired to help them address this question? It was Dr. Siegel. Now, how enlightening is that going to be? "I know it when I

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see it."
Well, I know it when I see it. That's adult, that's kid. (Indicating)
That didn't help much.
The truth is that what Mr. Rosenblatt told you on Monday is what he's espousing, and his class is also espousing in this punitive damage phase, as to what responsible advertising is. What is zero, when you really get down to the very bottom, that you have to stop manufacturing cigarettes?
But, ladies and gentlemen, that is not where the American public is today. That's why cigarettes are still legal here in the United States.
I'll go back to this for just a second. I'm

not going to belabor these points. We're down to the final three, really: Lorillard's current cooperation with public health organizations.
You know, that was kind of a funny story, funny in an odd way, that Marty told you. He told you that the Institute of Medicine, which is part of the National Academy of Science, recently put together a tobacco issues group, and then invited several cigarette manufacturers and a lot of other folks to participate in this tobacco issues group -- or whatever you want to call it -- committee.
And apparently, because Lorillard was too small, it overlooked Lorillard and didn't invite it. And Lorillard found out about it and said: Hey, we would like to participate; contacted the Institute of Medicine, and said: Would you mind if we participated in this program? They said: Sure. Here are some forms. Fill these out.
But Lorillard is committed to participating with public health organizations, in whatever -- in tobacco issues for sure.
Is it working towards safer cigarettes? I'm not going to belabor the tobacco-specific nitrosamine work. You've heard it repeatedly.
I'll add one more thing. Lorillard, with the

University of Kentucky, is working to reduce tobacco-specific nitrosamines in the other kinds of tobacco that is common in American cigarettes, Burley tobacco.
Ingredients. Lorillard discloses its ingredients to the Centers for Disease Control and to the state of Texas.
But Lorillard has gone a substantial step further. What is that? You heard about it in Phase I, you heard a little bit about it in Phase II or this punitive damage phase; and that is, Lorillard has tested over 200 ingredients, virtually every ingredient it uses in its cigarettes. Tested them, not as it exists by itself, but as they come out in whole smoke as consumed by smokers. And they've published that information in scientific journals for all scientists to review. And if there's any doubt about it, they have clearly revealed that they are participating in those studies.
Ladies and gentlemen, are all tobacco issues resolved? Obviously not. Obviously not.
Is Lorillard working toward assisting in

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resolving tobacco-related issues? Absolutely. Marty came here, testified under oath. His words can't be taken back. They're in this trial transcript; they're

available for anybody to read who wants to read this trial transcript. They're in his deposition for all time.

You know that Lorillard has voluntarily placed itself under the microscopic eye of the National Association of Attorneys General. You know what the acronym for that is? NAAG. Aptly named, I think.

I'm not going to go into that. You already heard about it. But I will tell you this: Through present day, Lorillard has never been accused of a violation, either in the letter or the spirit of the Master Settlement Agreement provisions.

All right. The second reason why Marty Orlowsky came here was to talk to you about the financial condition of Lorillard.

We brought you the CEO of the company. We brought you the person who is most knowledgeable about Lorillard.

You found out that Marty Orlowsky has run not just this business, but three other ones, three other companies. He ran two in the food group for Reynolds, RJR/Nabisco, when he worked there; then he bought his own business, ran his own business, sold his own business; and then runs Lorillard.

Now, the idea, ladies and gentlemen, that you

could come in in today's sophisticated society, and not know the financial end of your business is beyond naive. That's impossible.

The proof of that pudding, though, is, did Mr. Rosenblatt, who had at his disposal Mr. Cherner and Professor Mundstock, did he ask Marty Orlowsky one question about the financial condition of Lorillard that he couldn't answer?

Mr. Orlowsky brought you the financial records of Lorillard, financial statements of Lorillard, just like everybody else, December 31, 1999, audited by Deloitte, Touche, one of the three or four largest accounting CPA firms in the world.

The December 31, 1999, audited financial statements, that includes not just the net worth and changes in net worth from '98 to '99, but also the earning statements for three years, '97, '98, and '99, and the cash flow statements.

What is cash flow? Where you watch all the money come in, watch all the money go out. The income statement shows you the profit. The balance sheet shows you the net worth; sometimes called shareholder equity, sometimes called net worth.

He also told you that he is the guy that is responsible for the accuracy of this information at

Lorillard. That's Exhibit 38034. And he told you that Lorillard's net worth was $921.2 million. Not billion, but million.

He prepared -- Mr. Orlowsky prepared a summary of Lorillard's balance sheet.

Now, I don't think -- I know I didn't become a CEO or CPA sitting here in this courtroom. Perhaps

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you folks didn't either. But I think we all gained a working knowledge of what is meant by net worth. It's the assets, which means everything the company has, less its liabilities, which means everything it owes; and the difference is the company's net worth.

Now, Mr. Orlowsky told you that although Lorillard has a net worth of $921.2 million, that is not an amount of money that it can pay and stay in business.

This $921 million is not an amount of money sitting in a bank somewhere that you can just write a check for. This is rolling stock, that's cars and trucks; this is cigarette manufacturing equipment, handling equipment; this is -- Lorillard only has one plant, ladies and gentlemen, in Greensboro, North Carolina, one plant. That's the land, the building. It does include some money.

That's what makes up your net worth. You

can't write a check for your whole net worth. It's not like sitting in your checking account, where you can write a check.

As a matter of fact, Marty explained to you that in order to realize your entire net worth, you've got to sell off all your assets, pay all your bills, pay all your liabilities. And then you see whether or not, at the end, you have $921.2 million.

Now, can Lorillard borrow money?

Well, Marty Orlowsky had a real-life, one month ago, experience that answered that question. He testified to it. He went to the Chase Manhattan Bank looking to borrow money. Chase Manhattan Bank didn't just answer that question for itself; it was serving as a broker bank, and it went to a whole host of other banks and said: Look, are any of you guys interested in lending money to Lorillard?

The answer was, and they gave Marty the answer a month ago: No, none of us are interested in lending you money because of your uncertain financial future.

That is uncontroverted, ladies and gentlemen, uncontroverted because it's the truth.

Mr. Rosenblatt brought two financial witnesses: Mr. Cherner and Professor Mundstock.

You've already heard that neither of them have ever run any business. They've certainly never run a tobacco business. They have certainly never tried to borrow money for a tobacco business. They've certainly never borrowed money or tried to sell a tobacco business in this climate.

On Monday, Mr. Rosenblatt told you that Professor Mundstock and Mr. Cherner had come up with a range of values, a range of numbers.

I'll do this in a way that nobody can see what I write. Can everybody see that?

He said -- his chart says: This is what Lorillard can pay in punitive damages. And his range for Lorillard was $12.5 billion to 17 billion. I'll just use a B.

And he said: Whether it's direct examination or cross examination, that is the high and the low that you can find in the transcript from my experts.

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Ladies and gentlemen, both those numbers, in Lorillard's case, come from Professor Mundstock; and you can find, I agree, you can find 12 and a half billion and 17 billion, those words came out of Professor Mundstock's mouth. I agree with that. But neither one of them was the number he said Lorillard could afford to pay.

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And, ladies and gentlemen, you might say, if you missed it once, just an error, an oversight. You might say that. But if you miss another number that Professor Mundstock said not once, not twice, but three times regarding what was the absolute maximum amount of money that Lorillard could realize if it sold all its assets, all its assets, I don't think that can be the result of sheer error, oversight.

Let's see what Professor Mundstock said.

This is at Page 53179, Line 22: Okay, now, in point of fact, as you told me at your deposition, you actually don't believe that 12 and a half billion dollars is really the amount of money that Lorillard could get its hands on by this transaction either, correct?

Now, what Professor Mundstock was saying was he had some very complicated and unusual proposed transactions, including sale of all your assets, get rid of all your assets, get money -- it was -- but anyway, he said: Correct.

Question: You actually think that the maximum amount of money that Lorillard could get its hands on, if one engineered one of these kinds of transactions, is more in the neighborhood of about 10 -- 10? Where is 10 on this list? I didn't see

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10 -- is more like 10 billion; isn't that correct?

Answer: That's my best estimate. Best estimate. Okay.

Now, for Lorillard to get its hands on 10 billion, let's talk for a minute about a couple of these options.

One way would be to sell their assets, and you believe that's about the maximum Lorillard could get -- maximum.

What happened to 17 billion?

That's the maximum Lorillard could get if it just flat-out sold its assets.

Answer: That's the absolute most -- the most they could get their hands on immediately if they had to get their hands on all of the money at one time. That's current ability to pay.

The most you could possibly pull out of property is to sell it, because then your interest goes to zero. Goose egg.

That's twice. He said 10 billion twice. Here is a third time.

This is at Page 53182, Line 17: Okay. Now, to get my hands on this, if I sell all of the assets to get the full 10 billion, if Lorillard sells all its assets to somebody else, you agree Lorillard Tobacco

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Company, they're out of business?

That is correct.

Ladies and gentlemen, absolute most in a

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perfect world is $10 billion, according to Professor Mundstock, plaintiffs' expert.

What happened to the 17? What happened to the 12 and a half? Where did they go?

Let me ask you if you think that on a day after a $154 billion punitive damage award, when five companies have to go into the market to find this money, is that a perfect world?

Is that the maximum amount? Are they going to realize their maximum amount? Wow.

I'm not going to show you the instruction that says you can't destroy or bankrupt a defendant. Obviously, even by Professor Mundstock in a perfect world, absolute maximum, that's what happens to that.

Just think of that day, the day when five tobacco companies in the United States -- can you imagine what a used tobacco machine -- a used cigarette manufacturing machine goes for when five companies are trying to sell them to get $154 billion?

I would like to talk just a minute about that, Mr. Cherner, comparable sale situation.

Mr. Cherner didn't tell you anything about

the one comparable sale that Lorillard actually was involved in, Lorillard was involved in with Brown & Williamson just a few years ago.

This wasn't a special deal where Lorillard had some relationship with the brands. It wasn't buying the brands thinking it could turn them into something more significant. This was just a straightout: I'm going to buy 1 percent of the cigarette market in the United States. 1 percent.

It was the high bidder, the high bidder at $36 million for 1 percent.

Now, Mr. Rosenblatt said: Ah, but that's not a willing-buyer-and-a-willing-seller transaction.

Did this transaction get completed? No, it did not.

Why not? Not because Brown & Williamson and Lorillard didn't agree on the price. But you know it didn't get completed because the FTC came in and said: No, we think that would restrain the trade. We're not going to let you do it.

But Brown & Williamson and Lorillard absolutely agreed on the 1 percent for the sale of these brands for $36 million. And Lorillard was the high bidder.

Not a willing seller, says Mr. Rosenblatt,

because Brown & Williamson had to sell. They were buying American Tobacco; they had to sell.

Well, ladies and gentlemen, the day that these five companies go into the market to satisfy a punitive damage award of $154 billion, the day they go into the market to sell their assets to achieve that $154 billion award, are they willing sellers? Is it a willing-seller market?

Or is that a fire sale?

THE COURT: Counsel, I think we'll take a short break at this point.

All right, folks. I'll give you a short break at this time. Please do not discuss the case or reach any conclusions.

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THE BAILIFF: Please rise for the jury.
(The jurors exited the courtroom.)
(A brief recess was taken.)
THE BAILIFF: All rise.
THE COURT: All right. Bring the jury in, please.
THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.
(The jurors entered the courtroom.)
THE COURT: All right. Have a seat, folks.
You may resume.

MR. REILLY: I said I was only going to be an hour. An hour came, and I thought you guys all left.
Let me complete this thought real quick.
If you were to take this $36 million that represented 1 percent of the cigarette market when Lorillard purchased or attempted to purchase B&W brands, that would make, with Lorillard having either 9 or 10 percent of the market, Lorillard's value either $324 to $360 million. Not billion, but million.
But, again, this is the sale of the business. And that is contrary to the instruction, because that is a destruction of the business. This is not about having to sell the business.
There is a witness who did discuss, one of plaintiffs' two expert witnesses, that did discuss ability to pay, current ability to pay, but only indirectly. He did not tell you it directly.
Mr. Cherner talked to you about the $117 billion difference between the National Settlement Agreement and the Master Settlement Agreement number. Remember that?
And he acknowledged and you know that that was paid or going to be paid, that difference was over a 25-year period.
Now, I don't have the instruction here. I

put it over there. But the instruction says: This is not about installment payment. 25 years is an installment payment.
But what was Mr. Cherner indirectly saying about the ability to pay his -- and remember who he is. He is plaintiffs' antitobacco, activist expert.
What he is saying is: The industry's ability, current ability to pay -- you've done this math in your heads, probably -- it's 1/25 of that $117 billion, which happens to be $4.6 billion.
Now, that is what Mr. Cherner is saying is the industry's current ability to pay.
Now, Marty Orlowsky, we've already learned -- you've already seen that $10 billion is a number that Lorillard can't achieve. It can't destroy the business, and Professor Mundstock told you that $10 billion will destroy the business.
Marty Orlowsky told you he can't pay $921 million, because that will destroy the business. And the instruction says you can't bankrupt or destroy the business.
This MSA, NSA is based on -- the payments of it are based on market share. Lorillard's market share is roughly -- is 10 percent, under this calculation.
Mr. Cherner, you learned, was a math wiz.

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Look at what Mr. Cherner, with the calculation, knew.

10 percent of 4.6 billion is $460 million.

I have X'd out 900 -- that would have been his implied calculation of Lorillard's current ability to pay. (Indicating)

Now, ladies and gentlemen, I don't think it's an accident that 460 million just happens to be 50 percent of Lorillard's net worth, $921.2 million. Not for a math wiz, that's no coincidence.

What's being proposed by this 117 billion, when you take it down to current ability to pay by a fellow who is a math wiz and an antitobacco activist, that's what he does day after day and has been, for better than a decade, his number for Lorillard, current ability to pay, is $460 million, one-half of our net worth. In one lawsuit, he would take away one-half of Lorillard's net worth.

I've talked to you a lot about the changes that Lorillard has made, many in response to your Phase I verdict.

Will those changes, to you, make up entirely for the acts of wrongdoing that you found in your Phase I verdict? Probably not.

So now, what is a number from Lorillard that in its opinion represents an amount of money that it

can pay, which will punish it, but which does not destroy it?

Well, it just so happens that one of the similarities between Lorillard and Philip Morris is that 5 percent of our sales also occur in Florida. 5 percent of our profit roughly is generated here in Florida.

Am I going to propose 5 percent of our profits should be the punishment? No.

I'm going to suggest to you that a number that Lorillard would find painful but not destroying is 5 percent -- in one lawsuit, in one lawsuit, 5 percent of its net worth, which just so happens to be $46 million; one-tenth of the amount of money that plaintiffs' antitobacco activist mathematics wiz expert was telling you inferentially was Lorillard's current ability to pay.

Now, I openly acknowledge that will not destroy Lorillard.

But in one lawsuit, to take away one-fifth of its entire net worth, is substantial punishment.

I have one more topic I would like to cover with you, then I'll sit down.

Mr. Rosenblatt said, in his comments to you on Monday, that before a manufacturer can truly change,

it has to acknowledge its acts of wrongdoing; it has to apologize, and then it can go forward.

And Mr. Rosenblatt said none of these manufacturers brought their CEOs, none of these CEOs came to Phase I, none of them; none of them read a word of testimony from Phase I.

Well, ladies and gentlemen, you know how long Phase I took to try. Before Phase I started, each of these defendants was obligated to give a list of the witnesses that they were going to call in this trial.

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When this case started, when Phase I started, Lorillard identified who its witnesses were going to be, and it identified Dr. Alex Spears, who was at that time Lorillard's chairman of the board and chief executive officer. And my guess is that neither you -- and I know none of the defendants knew how long Phase I was going to take.

By the time -- Dr. Spears did come here, and he did testify. But by the time he got here in March, he had retired as Lorillard's chief executive officer. He was still chairman of the board, but he had retired as chief executive officer.

Mr. Orlowsky, in January, had taken over that post, January of 1999.

Dr. Spears was the right person to bring here

because he had years of experience with Lorillard. He knew the Lorillard story, and that's what was going to be communicated to you.

Let's see what Marty Orlowsky testified to -- oh, on Monday, Mr. Rosenblatt at the end -- maybe it was Tuesday morning; I forget which. But he went through a list, a laundry list of documents, do you remember, exhibits from Phase I.

He said: Nobody looked at the exhibits, no CEO looked at the exhibits; no CEO has come in here and apologized to you for these exhibits.

And then he went through a list of exhibits.

And one exhibit, No. 266, was the only exhibit that was a Lorillard-related document. And Mr. Rosenblatt said: And Marty Orlowsky should have come in here and apologized for No. 266.

Ladies and gentlemen, Marty Orlowsky came here and specifically apologized for No. 266. He didn't know Mr. Rosenblatt was going to pick it. He had no idea. He came in here -- I'm going to show you what he said. It's the last piece of testimony I'll show you. I apologize for showing all this testimony.

This is Page 55974.

Question: Let me change to one last subject, Mr. Orlowsky. There's been some discussion about

whether CEOs from the tobacco industry are familiar with what went on in earlier phases of this case.

Let me ask you, are you generally familiar with the evidence that was introduced in this case, in previous phases of the case?

Answer: Yes, I am.

In fact, did you read portions of the transcript and portions of the evidence?

Yes, I have.

What was Mr. Rosenblatt talking about?

Since all of the CEOs have been asked something similar, I just want to go ahead myself and ask you this question:

Based upon what you know, and on behalf of the Lorillard Tobacco Company, do you apologize to the American public or to the Florida class for any activities of Lorillard over the past 40 or 50 years?

Answer: Well, I apologize to the Florida class, to the American public, if anyone associated with Lorillard did or said anything that caused a misconception or was confusing to any smoker, wherever

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they are, that might have altered their decisions about whether or not to smoke or a decision that might end up where they would quit smoking. So I certainly would apologize for that.

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Question: And in your review of the evidence, was there any specific document or event involving Lorillard that troubled you that you wanted to talk about?

Marty Orlowsky couldn't -- we've talked about clairvoyance in this courtroom. There is no way Marty Orlowsky could have been clairvoyant and known that Mr. Rosenblatt, in his closing argument, was going to discuss this next topic:

Yes, obviously there are many, many documents in evidence; although for Lorillard, fortunately, I don't think we have too many documents. But all of a sudden one memo that was evidence in this trial, that was very troubling to me and that was a memo written by a middle-level salesperson, a manager, a sales manager, who made an observation with respect to Newports, what he called base of business, which I found -- when I discovered this document -- and this was done in the late '70s, obviously before I joined the company. But when I saw that, all I could say is, I thought it was ignorant and it was irresponsible, and it was something that I thought was something that obviously should not have been done, and I certainly would apologize for that. It was a totally irresponsible comment.

Ladies and gentlemen, that was the only

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document -- that was the only document that Mr. Rosenblatt discussed with you from Lorillard in his Phase I closing argument. It's the only document from Lorillard that he mentioned -- I forget whether it was Monday or Tuesday.

But Marty Orlowsky said: I apologize for that document.

Had he not looked at any exhibits? Clearly he looked at exhibits. He had pulled this one out on his own and said: That's wrong.

Ladies and gentlemen, David and I have brought you this evidence so that you could assess, when you determine what punitive damage award you want to enter in this case against Lorillard, how Lorillard is functioning today.

You get to now tell us -- I said to you in my closing argument in phase -- in the class representatives case, I said to you that every verdict you render sends a message, makes a statement.

I said it to you in the opening statement in this phase. You get to tell Lorillard now whether you want to render simply an economic blow that says, "Here's punishment but little else," or do you want to assess and communicate that you think Lorillard has taken some proper steps, is headed in an appropriate

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direction, and you want to say with your verdict, "You're doing the right thing about causation; you're doing the right thing about addiction; you're doing the right thing about trying to deal with advertising in an appropriate way; you're doing the right thing about research, cooperation, et cetera, and we want to

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encourage you to continue with research, continue with your limited ad campaign, continue with your youth smoking prevention program"?

Quite honestly, with your verdict, you choose the path we can afford to take.

Now, on behalf of Lorillard, its 3300 employees in Greensboro, North Carolina, David and myself, I thank you for your attention.

THE COURT: Thank you, sir.

MR. REILLY: Thank you, Your Honor.

THE COURT: All right. Who's next? Liggett?

MR. MARKS: Yes.

THE COURT: I don't know how you're going to get around there to write on it.

MR. MARKS: I'm not going to be writing.

THE COURT: If you don't need it --

MR. MARKS: We'll be putting things up here. Good afternoon, ladies and gentlemen.

THE JURY PANEL: Good afternoon.

MR. MARKS: This remarkable trial is coming to a close. After me, there's only one more company's presentation left.

Before I get started, though, I just wanted to say that Kelly and I and the people at Liggett and Brooke, including Mr. LeBow, truly appreciate your commitment to hearing and deliberations over the evidence in this trial.

You have committed yourselves and your time to service as no other jury has before you, and you should truly be commended.

Seven weeks ago I stood before you during opening statements, and I made promises to you, promises regarding what the evidence during this punitive damages phase would show as to Liggett and Brooke.

First and foremost, I told you that the evidence as to Liggett during this phase was going to be unique, indeed remarkable, compared to what you were going to hear about the other companies; that the evidence in this phase was going to show, clearly, that Liggett's business practices serve as a model as to how a tobacco company should conduct its business in today's world; that what Liggett has undertaken has no precedent in the tobacco industry, or in any other

industry for that matter; and that it took courage for Liggett, in the face of great hostility, to break with the industry and its past practices.

And what I further promised you during my opening statement, and I cannot overemphasize this, was that the evidence of this exemplary, this responsible conduct by Liggett was not going to come from people inside of Liggett; but that you were going to hear it from plaintiffs' very own witnesses.

Now, Mr. Rosenblatt is a fine lawyer, but he's not a professor of medicine. He's not a professor of public health. He's not a public health authority. He's a lawyer.

That's why, in this trial, we had witnesses. And the witnesses that Mr. Rosenblatt brought, they testified before you, and you heard from them about Liggett's exemplary and responsible conduct. You heard

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it from every one of them.
You heard it from the former Surgeon General, Dr. Julius Richmond; you heard it from the head of the Office of Smoking and Health, Dr. Ronald Davis; you heard it from Dr. Siegel; Dr. Cummings, and so on.
Liggett's actions and conduct were praised during this trial by Dr. David Burns, a contributor to all of the Surgeon General Reports over the past 25

years.
And in prior phases, Dr. Burns had testified for Mr. Rosenblatt. In this phase, Dr. Burns appeared only to attest to Liggett's exemplary conduct.
Also, in this phase of the trial, you saw letters from the attorneys general of 20 states, commending Liggett for turning, quote, "state's evidence" and assisting in the attorneys general's efforts to resolve smoking and health issues.
And, finally, you saw an official proclamation from the state of Florida, signed and sealed by former Governor -- sorry -- late Governor Lawton Chiles and the Attorney General.
This proclamation recognized Liggett and Mr. LeBow for their courageous efforts to make amends for the industry's past wrongs, and, quote, "to help secure a brighter and healthier future for all Floridians."
Now, I sat here on Monday, and I heard Mr. Rosenblatt ask you to award over $1 billion in punitive damages against my client, Liggett.
Now, I think Mr. Rosenblatt has done a tremendous job in this trial advocating on behalf of the class. But what I heard him ask you to do to Liggett is unbelievable, it's disappointing, and

frankly, it was shocking.
Why?
It's unbelievable because it directly rejects every word Mr. Rosenblatt's own witnesses said about Liggett during this phase of the trial. It is disappointing because it completely ignores the fact that Liggett has taken the actions it has taken, and that Liggett has completely reformed its business practices, and it is shocking. And in light of what the public health authorities said to you in this trial, it was irresponsible; irresponsible because it would destroy Liggett.
Not once, it wouldn't destroy Liggett once, it would destroy Liggett 25 to 50 times over. It was senseless.
And when you go back into the room to deliberate, I hope that you have the wherewithal to realize that.
In the next little while I'm going to review with you the testimony and evidence introduced during this phase of the trial as to Liggett and Brooke. I'm going to discuss the unique issues that Liggett presents for your deliberations, and I'm going to tell you plainly, why the objectives of punitive damages, punishment and deterrence would not be served, indeed

why they would be disserved by an award of any amount against Liggett and Brooke.

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The most logical place to start is the beginning. During plaintiffs' portion of this phase, Mr. Rosenblatt presented to you five witnesses representing the public health community. Each of those witnesses testified about the conduct of the tobacco companies.

Mr. Rosenblatt presented these witnesses to you because he believed -- and he was right -- that these witnesses are the best experts in the world concerning smoking and health and tobacco industry behavior. They are all persons of high integrity. Each has dedicated their careers to issues relating to smoking and health without any personal stake in the outcome.

Mr. Rosenblatt should not now ignore, or as he has effectively done, reject the testimony of these witnesses when it comes to Liggett.

I believe that you, too, should be guided by their testimony, so I want to start by taking a look at what Mr. Rosenblatt's own witnesses said about Liggett.

Plaintiffs' first witness during this phase was Dr. Julius Richmond, former Surgeon General of the United States, chief health officer of the entire

country.

Dr. Richmond's general testimony was that the tobacco companies have not made meaningful changes in the way they conduct business; that the companies still do not acknowledge, in clear language, the health risks of smoking cigarettes; and that the companies have been uncooperative with public health authorities.

In discussing Liggett's conduct, however, Dr. Richmond was completely different. In fact, he was only complimentary. Dr. Richmond repeatedly recognized Liggett as unique.

For example, Dr. Richmond was highly critical of the companies' statements regarding the hazards of smoking, but not Liggett. First look at Page 51408.

This is Dr. Richmond: There is no public acknowledgment, to the best of my knowledge, with the exception of one company, that cigarette smoking is addictive and harmful to health.

Question by Mr. Rosenblatt: That one company being Liggett?

Answer: That's correct.

Later, when I talked with Dr. Richmond about what Liggett had done, he agreed that the actions of Liggett, and only Liggett, were very positive changes for a tobacco company.

What are those actions by Liggett that Dr. Richmond praised? Well, for one, as you know, Liggett placed a "Smoking is addictive" warning on its cigarette packs.

To take another example, Liggett has also cooperated with the FDA and has fully complied with the proposed FDA rules regarding and restricting cigarette advertising. And as public health authorities have long asked, Liggett, alone among the companies, provides full cigarette ingredient information to those authorities and to the public right on its cartons.

I'll show you an example of Dr. Richmond commenting on some of its changes. Looking now at Page

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51597, starting on Line 7.

My glasses need to be exchanged.

I'm showing Dr. Richmond a board that shows a pack of Liggett cigarettes with an addiction warning.

Question: Doctor, this is a pack of cigarettes that Liggett sells today, and on this pack of cigarettes it has, as you can see, a warning on the front that "Smoking is addictive." Were you aware that Liggett puts this warning on its cigarettes?

Answer: Yes, yes, I am.

Do you consider that to be a positive change?

Answer: Very, very positive.

Doctor, you spoke briefly this morning about FDA regulation. Doctor, are you aware that Liggett has submitted itself to the regulation of the FDA?

Answer: Yes, I am aware of that.

And that Liggett has adopted several of the FDA's proposed rules?

Yes.

Do you consider that to be a positive change?

Yes, a very positive change.

To sum up Dr. Richmond's testimony about Liggett, I'm going to look now at Page 51601, looking at Line 10.

Dr. Richmond praised Liggett for taking, quote, "a leadership role in blazing a trail to openness and disclosure."

When I also asked Dr. Richmond whether he meant to include Liggett, when giving his opinion that the tobacco companies had not meaningfully changed their conduct, Dr. Richmond was emphatic, when he made that statement: There was one exception to it, and that was Liggett.

Plaintiffs' second conduct witness was Dr. Ronald Davis, the former director of the Office on Smoking and Health for the Centers for Disease Control.

Dr. Davis testified extensively about

cigarette advertising practices, and as you know, Dr. Davis' bottom-line opinion was that cigarette advertising in magazines has been on the rise over the past few years, and plays a powerful role in encouraging kids to take up smoking. That was his opinion.

But with Liggett, Dr. Davis testified that Liggett's decision not to advertise was a very important step forward.

I'm going to read to you from transcript Page 51846, starting at Line 12:

Doctor, are you aware today that Liggett does not advertise at all, no media advertising at all?

Answer: Yes.

That could explain why you didn't find any Liggett ads; is that right?

Correct.

That's a step forward as well; isn't that right?

A very important one, I believe.

In fact, Dr. Davis attributed Liggett's almost nonexistent share of the youth market to the fact that Liggett has discontinued advertising.

On redirect, Mr. Rosenblatt asked Dr. Davis

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whether he realistically believed that the major

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tobacco companies would stop their practice of placing attractive cigarette advertisements in magazines.

Dr. Davis obviously responded in the negative. Here he is, starting on Page 51854.

Mr. Rosenblatt posed the question: But, realistically, you know that's not going to happen?

Meaning the tobacco companies aren't going to stop advertising.

Dr. Davis's answer: That's right, unless they see the light somehow because of what Liggett has done. Perhaps they'll follow the lead of Liggett. Perhaps somebody will tell them not to do that anymore.

Perhaps they will follow the lead of Liggett.

On its face, this statement by Dr. Davis that the major tobacco companies should somehow follow little 1 percent of the market, Liggett's lead, and stop cigarette advertising, seems like an incredible reach.

But look at Liggett's track record on issues of causation, addiction, ingredient disclosure, advertising. It has been Liggett and Ben LeBow who have stepped forward and taken a lead on all these issues.

Liggett has shown that a tobacco company can act responsibly. That is not my opinion; I am also

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just a lawyer. That is the opinion of those people charged with directing the public health policy of this country, who came to this courtroom to testify to you.

Dr. Michael Siegel, the third witness, another prominent figure in the public health community in this country. He also testified at length about tobacco industry conduct. He was Mr. Rosenblatt's main witness on youth smoking and advertising.

Dr. Siegel's opinions could not have been clearer. I'm looking at Page 52043, Line 2. This is Dr. Siegel: What I want them to do is to do what Liggett has done. Liggett has come out and said: Smoking causes disease, period. It's the period I'm looking for. I would like to see a period.

No qualifications, just a period. And Liggett has done it and no one else has done it.

Dr. Siegel also agreed with Dr. Davis that Liggett's decision not to advertise cigarettes is the right thing to do.

Page 52017, Line 12: So, Doctor, you're aware that Liggett currently does no media advertising, no magazines, no newspapers?

Answer: Yes.

And do you consider that to be a good thing?

Yes.

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And that's a step in the right direction for a tobacco company?

Answer: Absolutely.

He agreed with Dr. Richmond that the changes Liggett has done are meaningful and positive.

I listed a bunch for him and this is what he said about it. Page 52118, Line 6: Would you describe these changes, the ones I just listed, by Liggett, as meaningful and positive?

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Answer: Absolutely.

Dr. Siegel also agreed, in no uncertain terms, that Liggett was on the right track as to how a tobacco company should conduct itself in today's world.

Would you say Liggett is on the right track, Line 9, as to how a tobacco company should conduct itself in today's world?

Answer: Absolutely.

Finally, on redirect, Mr. Rosenblatt asked Dr. Siegel about the CEOs and the major tobacco companies' statements to the public health community, that the tobacco companies are for openness, that they want to have a dialogue. As Mr. Rosenblatt talked about, Dr. Siegel said these statements did not impress him.

I want to read from what Dr. Siegel said.

I'm going to quote Dr. Siegel, because I do not want to paraphrase him:

What the tobacco company executives actually say is not important to me. What is important to me is what the tobacco executives do. And if the tobacco executives and the tobacco companies were really sincerely interested in reducing youth smoking and changing, then they would do what Liggett has done, come out and make admissions, without any qualifications, that smoking causes disease, period; and smoking is addictive, period; and we're not going to advertise to kids, period, and they would not continue these aggressive marketing tactics.

Dr. Siegel, like Mr. Rosenblatt's other witnesses, Dr. Richmond and Dr. Davis, all agreed that Liggett is the proper standard for responsible tobacco company behavior.

Mr. Rosenblatt called two other conduct witnesses. The first was Father Crosby. Father Crosby testified that his organization had made numerous shareholder proposals to tobacco companies to bring about changes in their policies on smoking and health.

What did Father Crosby say about Liggett? Father Crosby testified that because of Liggett's voluntary actions and changes in its business, such

shareholder resolutions simply were not necessary as to Liggett.

Dr. Cummings. As you know, Dr. Cummings was one of Mr. Rosenblatt's experts on class size. But Dr. Cummings also testified about the direct-mail advertisements that he and his family have received from the tobacco companies.

In his testimony, Dr. Cummings noted that Liggett does no direct-mail advertising to consumers. You saw no direct mailings from Liggett in this trial, and you saw no statistics from a smokers' database for Liggett. They don't exist.

Dr. Cummings, too, agreed that Liggett's actions were positive behavior for a tobacco company.

These five prominent individuals were not the only public health experts that testified during this trial about tobacco company conduct. There was one more. That was Dr. David Burns.

Dr. Burns, of course, testified here on behalf of plaintiffs during Phase I and Phase II-A of

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this trial. And as Mr. Rosenblatt noted on Monday, Dr. Burns is probably the foremost public health authority in the country on issues of smoking and health.

As you know, he's a Harvard-trained

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pulmonologist and professor of medicine and the author or editor of nearly every Surgeon General Report for the past 25 years. He has dedicated his life and career to fighting cigarette smoking and the tobacco industry. That's why Mr. Rosenblatt has had him testify before you several times.

But in this phase of the trial, Dr. Burns was a witness only for Liggett. A curious question that had to come to mind: Why?

Why would this life-long advocate for the public health appear in this punitive damages trial and give testimony on behalf of a tobacco company?

Was it because Liggett was paying him? Of course not. Not a penny. Not a chance. People like Dr. Burns, Dr. Richmond, Dr. Siegel, they cannot be bought. Smoking and public health issues are their lives, and their opinions and reputations are not for sale.

Was Dr. Burns subpoenaed by Liggett? Absolutely not. Dr. Burns appeared 100 percent voluntarily to testify for Liggett.

Then what was it? Well, at the beginning of his videotaped testimony that you saw, Dr. Burns explained why he testified for Liggett in this trial.

Dr. Burns knows, and he wanted you to know,

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that Liggett has adopted a responsible approach to tobacco. And this is what he told us, beginning on Page 55799: Why are you willing to come here today and testify on behalf of Liggett?

Well, because it is my belief that Liggett, over the last several years, since Mr. LeBow has taken an active role in directing the company, has adopted a responsible approach to tobacco. They have acknowledged the disease risks; they have worked cooperatively with public health entities; and they are actively attempting to mitigate the damage that their product has indeed caused.

It is indeed possible for a tobacco company to act responsibly and still function as a tobacco company. And having done that, I think it is part of my responsibility, as somebody who cares about public health, to acknowledge those changes on the part of a tobacco company.

Dr. Burns has, as he testified, worked closely with Ben LeBow and Liggett on public health issues since the company first stepped forward almost five years ago.

Dr. Burns could not have been clearer in his opinions about Liggett and Ben LeBow. We'll look at Page 55801, beginning on Line 2.

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Dr. Burns testified that since that time, I've worked with him extensively -- referring to Mr. LeBow -- as he has demonstrated that a tobacco company can act differently. A tobacco company can act differently by working with public health entities, by

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disclosing information, by acknowledging the risks, by acknowledging their responsibilities for past behavior, and then moving forward to try to change the future.

Dr. Burns was also asked about Liggett's sincerity in cooperating with the public health community on smoking and health-related issues. Dr. Burns was very firm on this. I'm going to show you Page 55808.

MS. LUTHER: I don't know if I can get it up there.

MR. MARKS: Looks good.

I think that Liggett is committed in cooperating with the public health community; that that is not simply rhetoric that they have adopted for convenient public health -- public relations policy.

And the reason why I feel that is, that they have actually taken actions; that it has gone well past rhetoric into actions where they were responsible, and in response to requests for the public health community; that they were proactive in approaching

regulatory agencies; that they cooperated when asked for information; that they cooperated with the state of Massachusetts, when they were asked to participate in releasing information to the public; and they have acted responsibly in relation to their advertising.

Finally, Dr. Burns was asked to consider how it is that tobacco companies should respond and change their conduct in light of your findings, in light of the jury's findings in this case.

Dr. Burns testified, and this is on Page 55809: I believe when your company is manufacturing a product that kills 40 percent of the people who use it, you have two important public health and societal responsibilities: You have to acknowledge that risk, and you have to try to mitigate that risk.

Liggett has.

In Mr. Rosenblatt's closing, he said he agreed with everything Dr. Burns said about Liggett; but that he, Mr. Rosenblatt, was not quite as enthusiastic about Liggett as Dr. Burns was.

Mr. Rosenblatt's opinion, his enthusiasm or his lack thereof, is not evidence in this trial.

Mr. Rosenblatt, a fine lawyer, did not participate in the writing of 25 years of Surgeon General Reports. Dr. Burns did. And, ladies and

gentlemen, that is why in this trial we have witnesses.

Liggett is the company in the tobacco industry, in the view of the public health community, that has acted responsibly.

Liggett is the company dedicated to help solve the smoking problem in this country.

Liggett is the company dedicated to cooperating fully with the public health community; those who we trust and rely upon for protecting the public health in this country.

And Liggett has done and is doing all this, not with just words, but, as Dr. Burns said, with actions.

Again, all of this evidence is from Mr. Rosenblatt's own witnesses. It could not be more significant in this trial that each and every

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representative of the public health community, who appeared during this phase of the trial, was only complimentary and supportive of Liggett's business practices.

They only had praise for Liggett's efforts to help bring about long-term resolutions to what are difficult problems.

The public health community knows well enough that people will not stop smoking at the snap of a

finger; that the cigarette industry is not going to disappear from this planet, from this country, tomorrow or next year. But in their view, the extent that cigarettes are legal in this country, cigarettes should be advertised and sold in the manner and only in the manner that Liggett has done and continues to do.

The public health community wants Liggett to stay in business.

Now, in addition to Mr. Rosenblatt's own public health witnesses, I would ask that you keep in mind some of the documents you saw in this phase concerning Liggett. They almost demonstrate that Liggett and Ben LeBow, as Ben himself testified, are dedicated to acting responsibly and furthering public health.

For example, on August 19, 1997 -- we're going to have to zoom on that. If not for them, maybe for me. On August 19, 1997, three years ago now, the attorneys general of 20 states, those 20 states' chief legal officers wrote a letter to the Office of the President of the United States, to the White House. This letter was about Liggett.

You saw it during the testimony of Mr. LeBow. After settling their lawsuits with Liggett, these 20 attorneys general wrote -- I'm now looking at Page 2:

Since entering into its settlements, Liggett has taken numerous significant actions which have demonstrated its utmost good faith in breaking with past tobacco industry conduct. Those actions involve not only cooperating with the attorneys general and others in lawsuits against the other tobacco companies, but also assisting public health groups and governmental entities in seeking to resolve smoking and health issues. These actions go well beyond the letter of Liggett's settlement agreements.

This letter was signed by 20 attorneys general, the chief legal officers of their states.

Now, you also saw, during this phase of the trial, the official proclamation from the state of Florida that was presented to Mr. LeBow and Liggett. The proclamation was signed and sealed by two of the leading antismoking government officials in the country: The late Governor Lawton Chiles, and Attorney General Bob Butterworth.

This proclamation from the state of Florida may very well be the single, most important document on punitive damages in this trial.

The proclamation describes -- the proclamation describes Liggett's important contributions on smoking and health. It describes

Liggett's assistance in helping the state of Florida to

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achieve the Florida Settlement Agreement.

I think it's worth reading in full. It's not that long of a document, but a short document could be pretty important:

The Proclamation, State of Florida, Executive Department.

Whereas, the State of Florida, in ending its lawsuit against the tobacco industry, took significant steps to protect the health of Florida's children and families by winning more than $11 billion, and historic restrictions on tobacco advertising; and

Whereas, the anticipated impact of that historic agreement is a reduction in smoking, particularly among young people and the general improvement of public health in Florida; and

Whereas, the decision of a single tobacco company, Liggett Group, Inc., to provide invaluable assistance and evidence in support of Florida was a major factor in obtaining a successful conclusion of the case; and

Whereas, that decision was made by one man alone, Bennett S. LeBow, a Florida resident and chief executive officer of Liggett's controlling company; and

Whereas, Bennett, in addition to providing

vital internal industry documents, took the unprecedented step for a tobacco executive of publicly admitting the hazardous effects of tobacco use; and

Whereas, Bennett, through Liggett's separate agreement with the state, approved the addition of new, stricter warnings of that company's product labels which ended its marketing practices directed at children; and

Whereas, Bennett's actions have earned him scorn, ridicule and condemnation from other industry's executives but established him as a valuable important ally in the war against Big Tobacco.

Following these "whereas" clauses, the State of Florida, through Lawton Chiles and the Attorney General, made a very significant, meaningful and official recognition of Mr. LeBow and Liggett:

Therefore, I, Lawton Chiles, by virtue of the authority vested in me as Governor of the state of Florida and by Attorney General Robert A. Butterworth, do hereby recognize Bennett S. LeBow for his courageous efforts to redress past wrongs and to help secure a brighter, healthier future for all Floridians.

Now, in this Florida punitive damages trial, I don't think I could write myself a more appropriate and relevant document to state Liggett's case for it

than this proclamation.

Of course, you saw Bennett LeBow yourselves here during this trial.

Mr. LeBow is the chief executive and largest shareholder of Liggett's parent company. Ben LeBow was the only executive who came to this court to testify during an earlier part of the trial.

As you recall, Mr. LeBow appeared during Phase I on behalf of the plaintiffs. It was Ben LeBow who, as he told you, make a historic decision on behalf of Liggett five years ago to change the direction of the company, and it is Ben LeBow who has ensured that

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Liggett works with public health authorities like Dr. David Burns.

As you know, Mr. LeBow testified that he was not involved with the day-to-day operations of Liggett until 1995, when cases, such as this one and several brought by the attorneys general, were filed and new allegations relating to addiction and youth marketing came to light.

At that moment, Ben LeBow dove into the smoking and health policy issues, and he took swift and decisive action to align the company with, not against, the public health.

As he told us, Ben was aware of the

consequences of his decision to change direction.

He knew, for example, that the rest of the industry would likely condemn Liggett. But in his words, Mr. LeBow did not care about adverse consequences, because he knew it was absolutely the right thing to do.

Nearly five years ago now, Liggett agreed to take specific steps to stop teenage smoking. Liggett agreed with and supported proposed FDA regulations. Liggett agreed to take down billboards, avoid brand sponsorships of events, such as concerts, and eliminate the practice of brand merchandising with regard to it, shirts and other items.

Liggett paid money from the company's own pockets to resolve smoking and health claims, rather than paying from price increases to smokers.

Ben LeBow and Liggett issued clear and unqualified public statements regarding causation and addiction, and added a "Smoking is addictive" warning to its cigarette packages.

Liggett provided full cooperation to the attorneys general and others in their lawsuits against tobacco companies.

Liggett disclosed truckloads of internal documents.

Mr. LeBow himself testified for plaintiffs in courts around the country.

As both Ben LeBow and Dr. Burns testified, Liggett has also provided full disclosure of the company's cigarette ingredients to the Massachusetts Department of Public Health and to the CDC, and on its cartons to consumers.

Mr. LeBow and Liggett made the decision not to advertise at all because it is unavoidable that advertisements are attractive to children.

And Mr. LeBow explained that he and Liggett have dedicated funds to Cornell Medical School, for the purpose of developing new technology to scan for early detection of lung cancer.

These are actions, not lip service. Liggett has taken unprecedented, far-reaching actions.

When Mr. LeBow was here and he testified about this -- when he was here during Phase I, he was approached by and thanked by several class members in the audience for his testimony. And Mr. LeBow testified a couple of weeks ago that he wants and intends to continue to work for the public health; that he and Liggett will continue to set a clear example for

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the other companies to follow, something that even Mr. Webb, the attorney for Philip Morris, the largest

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company in the industry, responsibly acknowledged yesterday as what has been Liggett's leadership role.

And Liggett is the company -- Liggett is the company that Mr. Rosenblatt has now asked you to destroy 25 to 50 times over.

It doesn't make sense to me.

Now, Mr. LeBow also spoke about Liggett's business and financial condition. I'm going to go over the evidence in this trial regarding these issues briefly. I hadn't planned on doing this. I didn't think I was going to have to. But in light of Mr. Rosenblatt's request to you on Monday, I want to make sure that the company's business and financial condition is clearly understood.

To start, you've heard, you've seen, quite a bit about the term "market share." You know by now that for a tobacco company, its current market share and the direction in which that share is heading is the best indicator of the -- of the condition of the company's business.

As this chart shows, which was shown to you during Mr. LeBow's testimony, Liggett's market share today is about 1.2 percent. It's down from about 3 and a half percent ten years ago.

Indisputably, there is no other tobacco

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company whose business has been declining at the rate Liggett's has.

Of course, Liggett's decision to stop advertising and to stop any appeal to youth has played no small part in that decline.

But you also heard Mr. LeBow testify about the fact that in 1996 and 1997, when Liggett broke from the rest of the industry and reformed, there was a price tag. Liggett's business in 1996, 1997 came under severe attack.

Letters were sent to Liggett's major customers suggesting that Liggett could not be trusted, and that continuing to do business with the company was not recommended. You saw an example of one of those letters when Mr. LeBow testified.

For the better part of 1997, three years ago, as Mr. LeBow said, Liggett had difficulty getting its products in store shelves in an atmosphere of great hostility towards Liggett within the industry.

In 1997 -- look at the chart. Liggett's market share dropped from 1.9 percent to 1.3 percent. That's a drop of a third. That's a loss of one-third of Liggett's business in one year; by far, the largest percentage drop in the history of a tobacco industry.

To date, Liggett's business has not

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recovered, as its market share and sales volumes remain near their 1997 lows.

As Mr. LeBow and Liggett knew, there was a high price to pay for telling the truth and moving to the public health side of smoking and health issues. But as Dr. Burns and others have made clear, at that point, Liggett only redoubled its efforts to tell the truth and work for the public health.

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Financially. Financially, Liggett has stabilized over the past few years. As Mr. LeBow testified, two years ago now, Liggett was completely under water. It had a highly negative net worth. The sale of the L&M, Lark and Chesterfield brands to Philip Morris was absolutely imperative for Liggett, because the company needed to pay off substantial debt that was coming due, and too avoid bankruptcy.

Now, Mr. Rosenblatt talked about Liggett's transaction with Philip Morris on Monday, and he was critical of Mr. LeBow and Liggett for going through with this transaction, this sale to Philip Morris, without insisting that Philip Morris keep the addiction warning on those three brands.

Now, in substance, this was really Mr. Rosenblatt's only criticism about Liggett's recent conduct during his closing. But, keep in mind, again,

this was Mr. Rosenblatt's criticism, and this was Mr. Rosenblatt's criticism alone. There were six public health authorities who appeared at this trial. At least three of them testified about Liggett's addition of an addiction warning, and all of them considered it a real step forward.

Not a single one of them criticized Liggett for what Mr. Rosenblatt has now criticized Liggett for. And that makes sense. That is why we have expert witnesses.

In order to keep the addiction warning on the L&M, Lark, and Chesterfield brands, which made up less than 15 percent of Liggett's volume, Mr. LeBow, plainly, would have had to have passed up on the opportunity to sell those brands, spelling the end for Liggett, and this would have been a real step backwards for the public health.

If Liggett, instead, went out of business, today there would be no cigarettes at all on the market with a "Smoking is addictive" warning on them; there would be no cigarette cartons on the market that had the ingredients on the side of the packages. All good purposes and intentions of Liggett's plainly, meaningful changes would have been defeated.

That is why in this trial we had witnesses.

Back to financial worth. As I said, two years ago Liggett had a highly negative net worth. As of December 31st, 1999, looking now at Liggett's financial statements, we saw that, and Mr. LeBow testified, that Liggett's net worth -- you have to zoom -- was now a positive $33,781,000. $33,781,000. But according to Mr. LeBow -- and I'll discuss with you later his qualifications to make this statement -- according to Mr. LeBow, Liggett's ability to pay a judgment does not reach, does not come close to $33 million.

Liggett has absolutely no ability to borrow money, and could not sell its hard assets for anywhere near what is shown on its balance sheet.

As opposed to the other tobacco companies in this case -- and, ladies and gentlemen, this is key -- it is beyond dispute that Liggett has no value to speak of in its trademarks. There is no value, and there cannot be any allegation that there's value missing

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from Liggett's financial statements.

The one remaining premium trademark that Liggett owns, the Eve brand, comprises only .1 percent of the market today. And Eve, unlike Chesterfield, Lark, and L&M, Eve was never a popular brand. And, therefore, Eve cannot be used to raise money.

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And this is confirmed by the evidence in this case. As Mr. LeBow explained, the company could not even find a single bank that would loan Liggett $8 million -- $8 million -- as a mortgage to Liggett to complete construction of a new factory, a smaller, compact, more efficient factory than the 100-year-old, big factory that houses Liggett now.

Also, Liggett today is secured by debt, and that debt bears an interest rate, as we heard, of over 15 percent. 15 percent already.

The reason for Liggett's complete inability to raise money is simple: Banks and investors are aware, and as Mr. LeBow testified, a judgment against Liggett in this trial, or in any of the hundreds of lawsuits around the country that Liggett faces, a judgment of anything more than -- and Mr. LeBow said this -- of anything more than 5 to 10 million dollars would cripple the company. That's 5 to 10 million dollars.

Just quickly, Brooke Group. The undisputed evidence in this case is that the only thing that Brooke Group Holding owns is Liggett. Brooke Group Holding has no operations of its own; Liggett is its only asset.

In light of this, as you will see on the

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verdict form when you go back and do your deliberations, Liggett and Brooke Group Holding are now on the same line of the verdict form in this phase.

Now, during Mr. Rosenblatt's closing, he also mentioned some parent and sister companies, a company called Vector Group, and BGLS. Those are parent and sister companies. And as you will be instructed by Judge Kaye, those companies are not defendants, and obviously Mr. LeBow himself is not a defendant. So those entities cannot be considered.

Now, other than Mr. LeBow, who knows what he's talking about, no one else in this trial testified about Liggett's financial condition in any relevant way.

I want to talk about this.

Mr. Cherner was Mr. Rosenblatt's lead financial witness. He said it himself, according to Mr. Rosenblatt, on Monday. Mr. Cherner had a valuation method. I will talk about that valuation method. And then Professor Mundstock basically came in here and said, as a general matter, that Mr. Cherner's valuation method was something that can be used.

As you recall, Mr. Cherner's valuation method, which Mr. Rosenblatt relied upon entirely in putting those unbelievable numbers up on his board on

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Monday, that valuation method was based on Philip Morris' purchase of Liggett's brands last year.

Now, this is significant. Mr. Cherner did not use this brand valuation method or any other

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method, for that matter, to come up with the value for Liggett. I'll show you the transcript.

As you can see, Mr. Cherner gave a value for Philip Morris, he gave one for RJ Reynolds, he gave one for Brown & Williamson, and he gave one for Lorillard.

Mr. Cherner did not come up with a valuation number for Liggett.

And as is borne out in the testimony of Mr. LeBow, and even the testimony of Mr. Mundstock, Mr. Cherner was 100 percent correct in not using this premium-brands transaction method to value Liggett. 100 percent correct.

Why is that? It's really quite basic.

L&M, Lark and Chesterfield are full-priced, highly profitable, premium-brand trademarks.

Philip Morris now owns those trademarks of those full-priced, profitable, premium brands, and they own them forever.

Now, it is undisputed that Liggett's business today has almost nothing to do with premium-brand trademarks, looking at this chart. You saw it during

Mr. LeBow's testimony.

This chart shows that 90 percent of Liggett's business is in the nonbrand segment of the market, the discount brand.

Looking at the next chart, this chart shows a breakdown of Liggett's sales during the first quarter of this year. And this chart clearly shows that the lion's share of Liggett's business is in the private-label brands and some black and whites.

And private labels, black and whites, Liggett does not have ownership of trademarks.

For its private-label manufacturing business, all Liggett has is a contract to manufacture cigarettes. In most cases, only for a year or so; not forever. Someone else, a convenience store, for example, owns the trademarks.

For this basic reason, to assess the value of Liggett's primarily discount, private-label-driven business by looking at the value that Philip Morris placed on these three full-priced, premium brands, it's comparing apples to elephants.

And Mr. Mundstock, for one, completely agreed with me on this point.

I asked Mr. Mundstock whether it would be reasonable to apply the L&M, Chesterfield and Lark

premium-brands valuation to the 88 percent of Liggett's business that is in the discount segment.

Here it is on Page 53258 of the transcript: Professor Mundstock, with respect to Liggett's product mix, you saw in Liggett's financial statements, 1999, 88 percent of Liggett's product mix was in the discount segment.

You've got Eve, and that's about it.

Only about 12 percent of Liggett's sales were in the premium segment.

Mr. Mundstock: That's correct. As I mentioned earlier, it's that shift that makes me so uncomfortable -- made me relatively uncomfortable with you, as compared to others, because your business changed so radically as a result of that transaction.

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Mr. Mundstock testified that he was more uncomfortable with using this valuation method for Liggett than for any other company, which makes plain sense.

The method is ridiculous as to Liggett. But despite the fact that his own expert was so uncomfortable with this method as to Liggett, Mr. Rosenblatt nevertheless bases his demand for punitive damage on it.

I continued with Mr. Mundstock:

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So for 88 percent of Liggett's business, the amount that's in the discount segment, it would be unreasonable, would it not, to apply this premium-brand transaction to valuate that part of Liggett's business; is that right?

It would -- a more refined analysis would require adjustments.

Question: Require adjustments, which you did not do?

Answer: Which I did not do, yes.

I then asked Mr. Mundstock whether it would be fair to apply the premium-brands theory to valuation of its private-label portion of its business. Mr. Mundstock agreed it would not be fair:

So, again, it would be unfair to simply apply the Chesterfield, Lark and L&M theory of valuation to private-label, contract manufacturing?

Answer: Yes.

Same thing for black and whites:

Question, Line 2: Certainly, again, unfair to simply apply the Chesterfield, Lark, L&M theory to black-and-white cigarettes?

Answer: Yes.

I then asked him: Professor, if it were the case, that 60 percent of Liggett's volume, their sales,

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is in the private-label and in the black-and-white business, doesn't that give you a little bit of pause about your valuation of Liggett?

And his answer: About -- using the brands transaction as a means of valuing Liggett's intangibles, which is, in general, the reason I prefer the other method.

The other method. Mr. Mundstock's preferred method for valuing Liggett. Whatever that method is, I don't know about it, because he never told us anything about it.

All we heard from Mr. Mundstock, and this was the only valuation of Liggett by Mr. Rosenblatt's experts, was this premium-brands valuation method.

To sum up, I posed this question to Professor Mundstock. Page 53262: Professor, on an intangible basis, a brand-value basis, Liggett is on a completely different planet than these four other companies?

Answer: Absolutely. After the brands transaction, you were on a completely different planet.

A different planet, outer space.

And this is what Mr. Rosenblatt bases his damages request against Liggett on: Outer space.

Now, you heard it from other counsel. There are many reasons why Philip Morris' purchase of these

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brands could not be used to reach a value for any of the companies, much less to think that you were somehow arriving at an amount that could be paid in punitive damages.

Perhaps the most significant reason is that the brands sale to Philip Morris, in that sale, the liabilities relating to L&M, Lark, and Chesterfield cigarettes did not transfer from Liggett to Philip Morris, rendering this method really silly.

Even for valuing a tobacco company, it is plainly unrealistic to think that someone could come in here and think that these companies have zero liability.

Even if this were a proper method, some sort of brands -- some sort of brands-valuation method, even if it were proper to use this sort of method to get a sale value for Liggett, based on a sale, based on a previous sale of Liggett, of cigarette brands -- and, again, I don't think that this could be proper -- but if you were going to try to use it, a far better sale to use as a model for Liggett would be the purchase of the Brown & Williamson discount brands that Mr. Reilly just talked about.

That sale -- it was not completed -- would have involved, however, discount-brand trademarks, a

whole lot closer to Liggett's business than are full-priced, premium brands.

The Brown & Williamson sale of discount brands, which had a total of about 1 percent of the market, was about for $36 million.

Ladies and gentlemen, that is remarkably close to Liggett's current market share of 1.2 percent, and its financial worth of a little under $34 million.

The last thing Mr. LeBow testified about on direct was the Master Settlement Agreement. Mr. LeBow told us that Liggett was complying with all the advertising and marketing restrictions of the Master Settlement Agreement and more; and the small-company exception that the attorneys general provided to Liggett, under the MSA, does not provide Liggett with some sort of appended advantage over the major companies.

Liggett's market share has not increased since the Master Settlement Agreement, and more importantly, it is obvious that Liggett does not compete at all with the major companies in the prized and highly profitable premium market.

In fact, Liggett's competitors are in the discount market, and there are dozens of them. And they, too, all have the payment exception under the

MSA.

Further, although Mr. Mundstock noted in his testimony that Liggett's operating income rose in 1998 and 1999, from next to nothing in 1997, we saw that in the first quarter of this year, Liggett's operating income was actually down more than 50 percent from the same time last year.

Now, in his closing on Monday, Mr. Rosenblatt argued at some length that the testimony of the tobacco companies' CEOs regarding their financial resources should be disregarded because they're all salespeople.

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He said that the CEOs do not have the experience or credentials of the areas of finance that plaintiffs' experts Mr. Cherner and Mr. Mundstock have.

For Liggett this is plainly not so.

Ben LeBow has been in the business of buying and selling companies for 30 years and has been intimately involved in investment banking and finance.

In fact, during cross examination of Mr. LeBow, it was obvious that Mr. Rosenblatt himself and even Mr. Webb looked to Mr. LeBow for expert financial opinions. Instead, Mr. Rosenblatt's own financial witness, Mr. Cherner, in his testimony, referred to Mr. LeBow as, quote, "one of the most astute businessmen in the world."

Mr. LeBow's testimony about the business and financial condition of Liggett is undisputed and unchallenged in this trial.

The unbelievable numbers that Mr. Rosenblatt asked for on Monday were based on two different things: First, Mr. Rosenblatt based his numbers on his experts' theories that the value that is missing from the company's net worth figures is the enormous value of the company's trademarks, which do not appear on the balance sheets.

For Liggett, this is plainly inapplicable. Liggett has no Marlboro, no Camel, no Kool, no Newport. There most certainly is not a billion or 1.8 billion in value in Liggett's trademarks.

What trademarks? Liggett doesn't have any trademarks.

There is nothing. To the extent Liggett had any intangible value that was not on its books, they sold it: L&M, Lark and Chesterfield. And the money that they got for it, that did not go to paying taxes; it went right onto Liggett's balance sheet to pay off debt.

Net worth, after that transaction, went from negative 145 million to now a positive 33 million. For Liggett, there is no value beyond that. For Liggett,

at least, net worth is that.

And Mr. LeBow and indeed Mr. Mundstock gave us a whole host of reasons why in this case that was it.

The other thing Mr. Rosenblatt said on Monday was that the absolute starting point for punitive damages should be $117 billion, the difference between what the tobacco companies agreed to pay in the congressional agreement, and what they agreed to in the MSA.

Again, nothing to do with Liggett. Liggett had absolutely nothing to do with the $368 billion Congressional deal; it didn't sign it, had no part in it, and certainly could not have paid under it. That was the other four companies by themselves.

The $250 billion MSA, again, almost exclusively the payments under the MSA were for the other four companies, not Liggett.

Liggett had its own deals with the state attorneys general, where Liggett paid -- and this was not insignificant to Liggett -- a few million dollars to the states. And that's because the states at least

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recognized Liggett's true ability to pay.

Your Honor, I probably have ten more minutes. Should I go forward?

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THE COURT: Go ahead. I'm not going to interrupt.

MR. MARKS: Okay.

Mr. LeBow's testimony on direct, my questioning of him, was the shortest of the five chief executives who appeared during this phase of the trial.

Of course, Mr. LeBow was the only one of the five CEOs who had been here before. Now, whereas Mr. LeBow's direct testimony lasted for less than two hours, strangely, his cross examination by Mr. Reid for RJR was quite lengthy.

If you may recall, for hours Mr. Reid stood up here, called Mr. LeBow names like plundering, and asked him hours of questions, suggesting that Mr. LeBow and Liggett have been motivated only by financial interests.

Now, the question that was on my mind that day, and maybe was on yours as well, was: Why? Why, during this punitive damages phase of the trial, was Mr. Reid doing this?

Was this aggressive cross examination of Mr. LeBow by Mr. Reid somehow supposed to convince you to award a lower punitive damage award for RJR? I don't think so.

Mr. Johnson gave his closing argument this

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morning for RJR, and he didn't mention anything about Mr. Reid's cross examination of Mr. LeBow.

So why? What reason did Mr. Reid spend as much time cross examining Mr. LeBow -- as much time as RJR spent putting on its own CEO, Mr. Schindler?

Well, it's not too hard to figure out. It's pure and simple. It's called spite. You saw it in Phase I when Mr. LeBow testified; and, oddly enough, you saw it here even during this phase, when these other companies are trying to convince you that they have made meaningful changes.

Well, plainly, Mr. Reid and RJR don't care much for Mr. LeBow and the actions that he and Liggett have taken over the past several years. And why should they?

You heard and saw the evidence in this phase from the representatives of the public health community, and in correspondence from the attorneys general, and in this Florida proclamation.

If not for the actions of Liggett, there would have been no Florida Settlement Agreement, no Master Settlement Agreement. RJR would not have had to take down their billboards, get rid of Joe Camel, and pay all that money to the states.

Mr. LeBow's actions forced the industry to do

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all of this, and of course, the other companies are scornful of him. He has cost them dearly.

And for these companies to sit through this trial and listen to members of the public health community hold Mr. LeBow and Liggett up as the standard by which they are to be measured and judged, was plainly more than they could tolerate.

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So RJR comes in here and suggests that Ben LeBow and Liggett have not been sincere.

Well, RJR seems to be alone in that opinion.

Certainly, the public health community and Dr. Burns don't question the sincerity of Mr. LeBow and Liggett.

Bottom line, RJR does not like Ben LeBow and Liggett. And if someone were to hurt Liggett significantly, what a satisfying victory that would be for them.

As I mentioned when I started, the last thing I wanted to talk to you about was whether the purposes of punitive damages would be served by an award against Liggett and Brooke.

You've already heard from other counsel that the two objectives of punitive damages are to punish and to deter.

You've also heard that in your deliberations,

you are to consider the conduct and circumstances of each of these companies individually, in determining whether punitive damages, if any, are appropriate.

I want to start with the second objective of punitive damages first: deterrence.

How, as a general matter, can an award of punitive damages meet the objective of deterrence?

Well, as others have explained to you, in simple terms, the idea is to send a message to a defendant and to others in society that that defendant's conduct should not be done.

I'm going to look at Liggett's business practices, at Liggett's conduct. What conduct should Liggett be deterred from? What is Liggett doing that it should not be doing? Or even, what is it that Liggett does not do that it should be doing?

Mr. Rosenblatt's own witnesses, the leading experts on smoking and health issues in this country, have given their answer to that question. As to Liggett: Nothing. Liggett does none of the things the public health experts want to deter, none of the things that they testified about when they came to this courtroom.

The indisputable and undisputed evidence is that Liggett's conduct meets every standard that the

public health community demands.

Each of the plaintiffs' witnesses themselves held Liggett out as the model, as the measuring stick for how a tobacco company should conduct itself; therefore, the notion that punitive damages should be awarded against Liggett as a deterrent to Liggett and others makes no sense.

In fact, such an award, very clearly, would send absolutely the wrong message to society and to other industries.

A punitive damage award against Liggett would flatly contradict, reject and fly in the face of what Mr. Rosenblatt's own public health experts, Drs. Richmond, Davis, Siegel, and even Dr. Burns, made clear in this trial, that they want the other tobacco companies to conduct themselves just like Liggett.

Now, Mr. Rosenblatt has suggested that the mere act by Liggett of selling cigarettes is something

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that requires deterrence. Again, with all due respect to Mr. Rosenblatt, that just simply is not correct.

It is an undeniable fact that no matter what is decided in this courtroom, cigarettes will be available on the market in this country for the foreseeable future. And given that unavoidable reality, does it make sense to deter Liggett from

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selling cigarettes?

Again, those who care about the public health have said: Absolutely not. If this industry is going to continue to function in this country, which it clearly is, those who care about the public health prefer that Ben LeBow and Liggett remain involved; if, for nothing else, to continue to set the example for how a tobacco company ought to conduct itself.

The other objective of punitive damages: Punishment. Bottom line. The issues in your deliberations relating to whether a punishment is appropriate as to each of these defendants are totally unique when you consider Liggett and Brooke.

Years ago now, well before Your Honor asked you to serve on this jury, Liggett acknowledged, in no uncertain terms, the harmful effects of smoking.

Again, before you were asked to serve on this jury, Liggett put a complete stop to any and all improper advertising and marketing conduct.

Most significantly, and again, before you were asked to serve on this jury, Ben LeBow and Liggett took actions to mitigate the damages that the tobacco industry has caused over time.

Actions to mitigate damages. Actually, those aren't my words. Those are the words of Dr. Burns.

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Maybe instead, Mr. LeBow should have done what Stanley Rosenblatt has suggested, and simply shut the doors and closed down Liggett. I will submit to you, however, that the steps that Ben LeBow and Liggett have taken and are taking to mitigate damages are much more meaningful and have provided far greater benefits to the people of this country and to this class than had Liggett simply gone out of business.

What Mr. LeBow and Liggett did, in the words of 20 attorneys general, was to turn state's evidence; to become, in the words of the late Governor Lawton Chiles and Attorney General Butterworth, Liggett became a valuable ally in the war against Big Tobacco.

Shutting down Liggett would have accomplished nothing.

Liggett's less than 2 percent of the market would have been consumed by these or other tobacco companies overnight. It would have had zero impact.

But little Liggett and Ben LeBow, taking up with the other side, with the attorneys general, with the public health community, to try to compel the rest of the industry to change their conduct and to take responsibility for the problems that smoking has caused, ladies and gentlemen, that will help lead to real change and real reform.

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Now, in some circles, or maybe just within one circle, the tobacco industry, Liggett is considered a turncoat, for the actions the company took.

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In society at large, however, in the real world, what Liggett has done is the right thing. When you ally yourself with the public health community and law enforcement, and bring about proactive change in the way an industry conducts itself, you're a responsible corporate citizen; you're a whistle-blower.

In society at large, isn't it the case that the actions Liggett has taken, not only breaking from the industry's past, but seeking to make amends for it, shouldn't conduct like that be encouraged rather than discouraged?

Responsible corporate citizens, whistle-blowers, should be protected, not punished.

But after all, don't we want the next company, or the next executive in the next industry that is the center of controversy, to have the courage to take the path of responsibility that Liggett has taken?

Don't we want to encourage, not discourage, responsible participants in other industries to step forward and initiate changes for the common good?

I do not know, and I do not understand, what

Mr. Rosenblatt was thinking on Monday when he suggested to you that an award of over $1 billion in punitive damages against Liggett was the right thing to do.

But I do know that what he asked for with respect to Liggett is completely contrary, and it rejects what his own witnesses said. An award of punitive damages against Liggett and Brooke, quite simply, would be wrong. It would do absolutely nothing for the class that Mr. Rosenblatt represents. 700,000 people, an award of $10 a person, $7 million, would cripple Liggett. What would be accomplished? What would be the point?

It would send a terrible message to other industries, other companies, other potential whistle-blowers. Indeed, it would be a victory only for those interested in seeing Liggett destroyed.

As Ben LeBow told you, he intends to continue what he and Liggett have begun, until smoking is no longer a threat to the public health. I ask you not to take away his and his company's ability to do just that.

On behalf of Kelly and I, on behalf of Liggett and Brooke and Mr. LeBow, thank you, again, for your time and your consideration.

THE COURT: All right, folks. We'll take our

recess at this point. Come back tomorrow morning at 9:30, the usual time.

Again, same rules apply over the night. Do not discuss the case, do not be exposed to any information, and certainly do not make up your mind about anything.

Court is in recess.

(Court was adjourned at 4:50 p.m.)

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